No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JEFFERY LYNN FORTIN
Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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37 pp

QUESTIONS PRESENTED

1. Whether Defendant-Appellant, FORTIN, was denied effective assistance of counsel throughout the lower, state court proceedings.

2. Whether the trial judge committed reversible error by failing to specifically advise Defendant-Appellant, FORTIN, of his right to a jury trial on the charge of habitual offender.

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PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

Thomas A. Howard, on behalf of Jeffery Lynn Fortin, petitions for a writ of certiorari to review the judgment of the Supreme Court for the State of Michigan.

OPINIONS BELOW

The order of the Supreme Court for the State of Michigan, denying Defendant's Application for Leave to Appeal (App. A infra p. A-1) is not yet reported. The opinion of the Court of Appeals for the State of Michigan (App. B. infra p. B-1) is not yet reported. The transcript of the Circuit Court's denial of Defendant's Motion to Vacate Sentence and Withdraw Pleas is set forth in Appendix C)

JURISDICTION

The Circuit Court for the County of Livingston, state of Michigan denied Defendant's Motion To Vacate Sentence and Withdraw Guilty Pleas (App. C infra) on September 25, 1985. The opinion of the Court of Appeals for the State of Michigan (App. B. infra) was entered on October 15, 1986. The Order Denying Defendant's Application for Leave to Appeal (App. A. infra) was entered in Supreme Court for the State of Michigan on February 23, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

2. Section 13 of the Habitual Offenders Statute, MCLA 769.13; MSA 18.1085, provides in relevant part:

> If after conviction and either before or after sentence it appears that a person convicted of a felony has previously been convicted of crimes as set forth in [MCLA 769.10, MCLA 769.11 or MCLA 769.12], the prosecuting attorney of the county in which the conviction was had may file a separate or supplemental information in the cause accusing the person of the previous convictions. The court in which the conviction was had shall cause the person to be brought before it and shall inform him of the allegations contained in the information, and of his right to be tried on the allegations, and require the offender to say whether he is the same person as charged in the information or not . . . . The accused my waive trial by jury in the manner provided by this act . . . . If the accused pleads guilty to the information, . . . the court may sentence the offender to the punishment prescribed in [MCLA 769.10, MCLA 769.11 or MCLA 769.12] and shall vacate the previous sentence . . . .

STATEMENT OF THE CASE

Defendant-Appellant JEFFREY LYNN FORTIN (hereinafter "Defendant FORTIN") was charged with one count of criminal sexual conduct, first degree, and one count of habitual offender, third offense, arising from an incident alleged to have occurred on or about September 2, 1984. At the September 18, 1984, preliminary examination, fourteen year old Mary Frances Dayton, the alleged victim, testified that Defendant FORTIN had, armed with a knife, sexually assaulted her. Defendant

FORTIN was represented at the preiminary examination by Public Defender, Paul Decocq. At the close of the preliminary examination, the district court ruled that the prosecution had established probable cause. Defendant FORTIN was bound over for trial.

Pursuant to a plea agreement between the defense and the prosecution, the court entered Defendant's guilty plea on December 10, 1984, to the reduced charges of criminal sexual conduct, third degree, and habitual offender, second offense.

On January 10, 1985, Defendant FORTIN, represented by Public Defender, Dennis L. Perkins, was brought before the circuit court for the county of Livingston, state of Michigan, for sentencing. The sentencing was postponed for seven (7) days pursuant to defense counsel's request that Defendant FORTIN be permitted to submit to a polygraph test by the Michigan State Police to resolve the issue of whether or not Defendant had employed a knife in committing the alleged offense. The complainant testified, and the Pre-sentence Investigation Report indicated, that Defendant FORTIN had a knife in hand when the alleged assault occurred. In spite of his guilty plea, Defendant FORTIN steadfastly maintained throughout all proceedings that he did *not* have a knife when the assault occurred.

On January 17, 1985, the sentencing hearing was reconvened, and materials relevant thereto, including the results of the polygraph examination, were presented to the court. Defendant was again represented by Public Defender, Perkins. Defendant FORTIN was sentenced to a jail term of ten (10) to fifteen (15) years for criminal sexual conduct, third degree. Vacating said sentence, the court then sentenced Defendant to a jail term from fifteen (15) to twenty-two and one-half (22-1/2) years on the charge of habitual offender, second offense. The court recommended that Defendant FORTIN serve a minimum of ten (10) years in prison.

Subsequent to sentencing, Defendant FORTIN retained counsel herein for purposes of motioning the lower court to vacate

his sentence and withdraw his plea of guilty. The motion was filed on February 22, 1985. An evidentiary hearing was conducted on September 24 and 25, 1985. At the conclusion of said hearing, the court denied Defendant FORTIN's Motion to Vacate Sentence and Withdraw Guilty Plea.

On Octobrer 1, 1985, Defendant FORTIN filed a claim of appeal from the final order of the circuit court, entered September 25, 1985, denying his motion to withdraw guilty plea. On October 15, 1986, the Court of Appeals for the State of Michigan issued an order affirming the circuit court's denial of Defendant's Motion. On October 29, 1986, Defendant filed Application for Leave to Appeal in the Supreme Court for the state of Michigan, requesting reversal of the court of appeals' decision. On February 23, 1987, the Supreme Court for the state of Michigan denied Defendant's Application for Leave to Appeal.

Defendant now petitions the United States Supreme Court for Writ of Certiorari, requesting relief from the ruling of the state court.

REASONS FOR GRANTING THE PETITION

1. This case presents important questions concerning an individual's sixth amendment right to assistance of counsel. "The right to counsel means at least the right to effective assistance of counsel." *Powell v. Alabama,* 287 U.S. 45, 55 (1932). Defendant FORTIN was represented at his preliminary examination and plea by Public Defender, Paul Decocq. At both sentence hearings, Public Defender, Dennis L. Perkins, appeared on Defendant's behalf.

The record of the proceedings in this case, as supported by the hearing on Defendant FORTIN's Motion to Vacate Sentence and Withdraw Guilty Pleas, reveals that both defense attorneys failed to meet the Michigan, minimum *Garcia - Beasley* (infra pp. 5-6) standard of effective assistance of counsel, as well as the federal standard for effective assistance of counsel established by this Court in *Strickland v. Washington,* 466 U.S. 668 (1984) and

recently reaffirmed in *Hill v. Lockhart,* Slip Op. 84-1103 (November 18, 1985).

> a) Defendant FORTIN was deprived of effective assistance of counsel by the failure of defense counsel to investigate Defendant's criminal record so as to assist him in making an informed decision on whether to plead guilty or proceed to trial.

Defendant FORTIN was initially charged with criminal sexual conduct, first degree. The prosecutor then supplemented the information to include a second charge, habitual offender, third offense, under the Michigan habitual offender statute. While the Michigan court of appeals concluded that defense counsel "fully advised defendant of a variety of possible pleas, convictions and possible consequences" (App. B. infra p. B-2), both Defendant and attorney Decocq stated that a serious question existed concerning the actual number of prior felony convictions against Defendant. A review of attorney Decocq's testimony at the evidentiary hearing on Defendant's Motion to Vacate Sentence and Withdraw Pleas reveals that Defendant's prior criminal record was never accurately investigated by defense counsel. Absent accurate information regarding his prior criminal record, Defendant was unable to make a voluntary, informed decision whether or not to accept the plea agreement offered by the prosecutor.

A guiding principle in determining the existence of ineffective assistance of counsel is whether counsel's conduct has so undermined the proper function of the adversarial process that the proceedings cannot be relied on as having produced a just result. *United States v. Collins,* 595 F.Supp. 1068, 1071 (D.C. Mich. 1984). The court of appeals, in *People v. Nyberg,* 140 Mich.App. 160; 362 N.W.2d 748 (1984), recited the Michigan standard of ineffective assistance of counsel.

> First, we must determine whether defense counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law. *Beasley v. United States,* 491 F.2d 687, 696

(C.A.1974). Second, we must determine whether but for the alleged error there was a reasonable likelihood that Defendant would not have been convicted. *People v. Garcia*, 98 Mich. 250, 266; 247 N.W.2d 547 (1976).

It was incumbent upon defense counsel to ascertain all relevant facts regarding Defendant FORTIN's prior criminal record and to share this information with Defendant. Their failure to do so demonstrated a serious lack of conscientiousness in representing Defendant and protecting his rights.

Defendant concedes that his conviction herein constituted a second offense. Originally, however, Defendant was charged with habitual offender, *third* offense, carrying a much more severe penalty than second offense. Had the case proceeded to trial, there is a strong likelihood that the prosecution would only have been able to prove criminal sexual conduct, third degree. The prosecution would never have been able to prove habitual offender, third offense. Had Defendant FORTIN been adequately apprised of these matters, it would have affected his decision on whether to proceed to trial.

Q. (by defense counsel, Stuart) You testified that you at first did not know that the Habitual Offender Third was in fact accurate?

A. (defendant) At first I didn't know it was wrong, at first.

Q. Okay. If you had known it was wrong at the time you entered the plea, would that have affected your decision?

A. Yes.

Q. With regard to entering that [your] plea?

A. Yes.

(Motion Tr. 9-24-85, pp. 64-65).

In *Hill v. Lockhart, supra*, this Court, *citing McMann v. Richardson*, 397 U.S. 759, 771 (1970), concluded that "where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the

voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " The *McMann* opinion underscored that "defendants facing felony charges are entitled to effective assistance of counsel." 397 U.S. at 771 and n.14.

Defendant FORTIN testified, supra, that but for counsel's unprofessional error in failing to obtain an accurate history of Defendant's prior convictions, and to advise him of his actual posture in the prosecution, he would not have entered a plea of guilty. Defense counsels' errors were not harmless. They were highly prejudicial to Defendant and necessitate a reversal of Defendant's conviction.

b) Defense counsel committed errors so serious with respect to the proffered polygraph examination, as to cause incurable prejudice to Defendant FORTIN and deny him effective assistance of counsel.

At all times during the proceedings in this cause, there existed a serious dispute concerning whether or not Defendant used a knife in the alleged assault. The original charge of first degree criminal sexual conduct was predicated on the prosecutor's claim that Defendant perpetrated his alleged assault armed with a knife. Defendant vehemently denied that he carried a knife. His testimony at the evidentiary hearing demonstrated that he supplied his attorneys with all of the facts surrounding the incident alleging his use of a knife and requested that counsel investigate those facts. Complainant claimed that Defendant withdrew a knife from the console of his vehicle during the assault. It was imperative that defense counsel retain an expert to measure the console so that the expert could offer testimony that the large butcher knife described by complainant could not possibly have fit in the console of Defendant's car as she claimed. Defendant testified that "my father told me that Mr. Decocq was going to have an investigator come out and take measurements on my car console and check my car out, but it was never done." (Evidentiary Tr. 9-24-85 p. 29).

Defendant's use of the alleged knife was the primary basis for the charge, criminal sexual conduct, first degree. Whether Defendant in fact possessed a knife was the pivotal case issue, and significantly impacted not only on the severity of the charge but also on the court's judgment of sentence. Had Defense counsel protected Defendant's rights from the inception of the case, the ambiguous polygraph report might never have come before the court. Clearly, defense counsel had a duty to Defendant to investigate the car and Defendant's version of what had or had not occurred. They failed to perform far below any objective standard of reasonable conduct; certainly well below the level of a lawyer with ordinary training and skill in the criminal law.

Even in the unlikely event that counsels' overall performance is found to have met the standards for effective assistance of counsel, their mistake in failing to investigate the circumstances surrounding the use of the alleged knife was sufficiently serious to have deprived Defendant of his right to a fair trial and effective assistance of counsel, mandating reversal of Defendant's conviction. According to *People v. Garcia*, "even where assistance of counsel satisfies the constitutional requirements, defendant is still entitled to a fair trial. Defendant can be denied this right if his attorney makes a serious mistake." *Supra* at 266; 247 N.W.2d at 553.

Despite the existence of a solid defense to the charge of first degree, criminal sexual conduct, defense counsel made no attempt, whatsoever, to offer evidence to rebut the prosecutor's allegation that Defendant had a knife during the alleged assault. Defense counsel incredulously stated "[y]our honor, I'm not gonna beat a dead horse. The People have met their burden here today." (Preliminary Exam. Tr. 9-18-84, p. 83).

As a result of defense counsels' failure to properly investigate the case, they were forced to "shoot from the hip" at the time of sentencing. The request for the polygraph test was an afterthought to mitigate circumstances at the time of sentencing. A perusal of the record demonstrates that this request was highly prejudicial to Defendant.

The court of appeals missed the issue when it stated, "[h]ad the trial court not permitted the test, in all probability, defendant would have claimed ineffective assistance of his counsel for not insisting that the polygraph be taken." (App. B. infra p. B-3) It is true that Defendant willingly submitted to the polygraph test, however, a criminal defendant is not a lawyer. He is neither able, nor should he be expected, to comprehend all the ramifications of the various actions taken by defense counsel. Nor can he be expected to act in his own defense when his attorney fails to so act. Once having made the request for the polygraph test, defense counsel had a responsibility to ensure that the test would be performed by an impartial third party and that the results clearly determined, once and for all, whether Defendant had used a knife in the alleged assault. Defense counsel breached their duty on both counts.

Defense counsel should have known that a polygraph examiner, employed by the state police department, an arm of the government prosecutor, would be biased against a criminal defendant and that biased test results would gravely damage Defendant's chance of having sentence imposed by an impartial court.

At best, the examiner's report was ambiguous as to the issues of 1) whether Defendant had a knife at the time of the alleged assault and 2) whether Defendant somehow led the complainant to believe he possessed a knife. Neither question was conclusively answered. Based on information related to them by Defendant, counsel was on notice that the examiner may have omitted information which would have clarified his findings.

> (by defense counsel, Perkins) Mr. Fortin relayed to me that the examiner told him that as far as: 'Did you have a knife in your possession at the time of the incident?' the examiner has told Mr. Fortin that he believes him when he says he did not. (Tr. 1-17-85 pp. 8-9)

Due to the ambiguous nature of the polygraph report, the trial court stated on the record that the report would be considered as only demonstrating that Defendant was unable to refute

the complainant's claim that a knife had been used. The assumption of this position by the court greatly prejudiced Defendant. Defense counsel took absolutely no steps to request a second impartial test or, at the very least, clarification of the examiner's report by way of requesting a supplemental report. The latter is particularly relevant in light of Defendant's testimony that the examiner had told him that "he would state on his report, which he did not, that . . . to the best of his knowledge, that I was telling the truth on the issue that I did not have a knife in my possession and the knife was not being used." (Sentencing Tr. 1-17-85, p. 13)

Although Defendant willingly submitted to the polygraph in order to disprove allegations that he used a knife, he could not possibly have foreseen that the government examiner would insert numerous prejudicial and inflammatory remarks in his report. Defense counsel made no attempt to object to this highly damaging information which never should have come before the sentencing judge. The judge stated,

> I will indicate to you that there are many, many statements in that polygraph test report that are prejudicial to you, talking about other crimes and about here — times in which you have been with victims and you may have talked about knives or threatened knives. (Tr. 1-17-85, p. 20).

In the same breath that the sentencing judge claimed that all prejudicial statements would be ignored, he remarked that "[f]rankly, I looked at that document and I was a little bit shocked at some of the things in that document." (Tr. 1-17-85, p. 20). Later at the evidentiary hearing, the court, referring to the polygraph results, stated,

> I couldn't totally ignore what they presented to me. And I did ignore a lot of it with respect to the prejudicial comments . . . I was perfectly aware and felt that probably the polygraph operator was using this opportunity to stick it to this Defendant. (Tr. 9-25-85 p. 149)

Even after being told of the court's position and its shock at the contents of the examiner's prejudicial report, defense counsel made no attempt to request that another impartial test be ordered by the court in an effort to protect Defendant's right to a fair and impartial imposition of sentence. Moreoever, defense counsel took no steps to have the sentencing judge disqualified on the grounds that he had been improperly and unnecessarily exposed to highly prejudicial material.

The sentencing judge was incapable of ignoring the extraneous, "shocking" matters contained in the polygraph report. This is evidenced by the fact that the sentencing judge imposed the maximum possible sentence on Defendant. In lieu of the inevitable bias engendered by the ambiguous and inflammatory test report, a fair assessment of an appropriate sentence was rendered virtually impossible. Defense counsel caused this untenable situation. Failure to take curative steps demonstrated their total lack of conscientiousness, and resulted in irreparable error and prejudice to Defendant in the sentencing proceedings.

Error so grave as to affect the outcome of a case amounts to ineffective assistance of counsel and warrants reversal. *People v. Knight,* 94 Mich.App. 526; 288 N.W.2d 649 (1980); *People v. McVay,* 135 Mich.App. 617; 354 N.W.2d 281 (1984); *Hill v. Lockhart,* supra at p. 7.

2) The trial judge committed reversible error by failing to specifically advise Defendant FORTIN of his right to a jury trial on the charge of habitual offender. The court failed to comply with the necessary requirements set forth by court rule and mandated by the habitual offender statute to establish a voluntary plea.

When the record of the plea proceedings is reviewed *in toto,* it is readily apparent that Defendant's conviction cannot stand. Defendant FORTIN was not specifically advised 1) that he had a right to trial by jury on the habitual offender charge and 2) that the prosecutor was obligated to prove his status as a habitual

offender beyond a reasonable doubt. The following is an excerpt from the plea proceedings.

> (Court) . . . Do you understand there is going to be no trial in this case if I accept your plea?
>
> (Defendant) Yes, sir.
>
> (court) Do you understand that you would have a right to a trial by jury or by the Court alone, at your option?
>
> (Defendant) Yes, sir.
>
> (Tr. 12-10-84, p. 8)

In its opinion (App. B. infra p. B-3), the court of appeals took the position that a "single recital of rights applying to both the charged offense and the habitual offender charge may be sufficient." In support of its position it cites *People v. Voss,* 133 Mich.App. 73; 348 N.W.2d 37 (1984) and *People v. Cuellar,* 144 Mich.App. 187; 374 N.W.2d 925 (1985). In each instance, however, the court misstated and misinterpreted the true findings of the *Voss* and *Cuellar* courts. In *Voss,* the court actually stated that, "we believe that the single full recital of rights to defendant *and the court's statement to defendant that those rights applied to the supplemental charge* constituted compliance with the mandates of *[People v. Brownridge,* 414 Mich.377; 325 N.W.2d 125 (1982)]." (133 Mich. App. at 76-77; 348 N.W.2d at 38) (emphasis added). Likewise, in *Cuellar* the court actually held that,

> . . . this familiar judicial technique of intertwining several guilty pleas in the same proceeding presented a special problem in the context of this case. A reasonable inference can be made that rights recited concerning one substantive offense also apply to other substantive offenses, but a reasonable person would not necessarily infer that rights applicable to a substantive offense also apply to an habitual offender charge, which does not charge a distinct substantive offense. Although a defendant may not understand the peculiar nature of an habitual offender charge, it would be rash to assume that a defendant arrived at a correct understanding of

his rights through a mistaken belief that an habitual offender charge is indistinguishable from a substantive charge. *It is essential that the record affirmatively show that defendant was informed that the rights recited by the judge applied to both the substantive offense and the habitual offender charge." Id.* at 190; 325 N.W.2d at 926 (emphasis added).

The cases cited by the court of appeals *support* rather than invalidate Defendant's position that a defendant be specifically informed of his right to a trial by jury on the habitual offender charge. A cursory review of the record, supra, reveals that no such care was taken by the trial judge in advising Defendant of his rights.

The court, in *People v. Brown,* 253 Mich. 537; 235 N.W. 245 (1931), noted that strict compliance with the habitual offender statute is crucial because the consequences thereunder are so serious. The court stated that strict *technical* compliance with the statute is necessary and *must* be reflected in the record. That Defendant FORTIN signed a jury waiver form and discussed his waiver of rights with counsel does not negate the court's duty to take a habitual offender plea pursuant to *Brown* and in strict compliance with the statute.

Defendant's testimony at the evidentiary hearing demonstrated his lack of understanding as to the procedural import of an habitual offender charge.

Q. (by defense counsel Stuart) Jeff, you had an opportunity to look at the Peoples' exhibit, the pleas form. When you signed that form did you understand that if you chose to go to trial that you would be tried for the crime of criminal sexual conduct, first degree?

A. (by Defendant) I understood that.

Q. Did you understand that you would also be tried on the charge of habitual offender, third degree?

A. I didn't realize —

Q. Or third time, excuse me.

A. I didn't realize it was a separate charge. I thought it was automatic.

Q. Did you believe when you signed that form that if you went to trial that there would be a trial with respect to that charge?

A. The third degree charge or the habitual charge?

A. The habitual.

A. I thought I was going for the first degree. I didn't know it would be a separate — separate thing on that.

(Tr. 9-24-85, pp. 63-64; *see also* Tr. 9-24-85 pp. 21, 37, 40-42)

The trial court only advised Defendant of a general right to trial by jury. The court failed to comply with the strict plea requirements under the Michigan habitual offender statute, and its failure to adhere to Michigan law resulted in Defendant entering an uninformed plea based on a misunderstanding of the procedural import of the supplemental information. Defendant clearly did not understand the independent nature of the habitual offender charge, and did not understand that the prosecutor would have had to prove Defendant's alleged status as an habitual offender beyond a reasonable doubt. This is particularly significant because there existed a serious doubt as to whether Defendant's conviction on the criminal sexual conduct charge would, in fact, be a third felony conviction.

According to the court in *People v. Coates,* 377 Mich. 56; 59 N.W.2d 83, *lv denied,* 346 U.S. 840 (1953), a guilty plea "should be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance." *Id.* at 74; 59 N.W.2d at 92. Defendant FORTIN's plea to habitual offender was not voluntary. It was proffered in ignorance of his constitutional right to trial by jury thereon at which the government would have to prove his habitual offender status beyond a reasonable doubt.

CONCLUSION

The issues raised in this petition involve legal principles of major significance to federal and state jurisprudence. The decision of the circuit court, as affirmed by the Michigan court of appeals was clearly erroneous and has caused, and will continue to cause, material injustice to Defendant FORTIN if not remedied by this Court. Moreover, the refusal of the Michigan Supreme Court to consider Defendant's appeal has left conflicting decisions within the state court of appeals unresolved. The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS A. HOWARD
Attorney for Defendant-Appellant

Dated: April 20, 1987

APPENDIX A

Order

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 23rd day, of February in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable
DOROTHY COMSTOCK RILEY,
Chief Justice

79678

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

JEFFREY LYNN FORTIN,
Defendant-Apellant.

SC: 79678
COA: 87900
LC: 84-4043-FC

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Entered by Order of the Court
/s/ Corbin R. Davis, Clerk

APPENDIX B

Opinion — October 15, 1986

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE of the
STATE OF MICHIGAN,

Plaintiff-Appellee

-v- NO. 87900

JEFFREY LYNN FORTIN,
Defendant-Appellant

BEFORE: R. J. Danhof, CJ, Allen and D. E. Holbrook, Jr., JJ.

PER CURIAM.

Defendant was initially charged with first degree criminal sexual conduct for forcing the 14 year old victim to perform oral sex upon him at knifepoint. In a supplemental information, defendant was charged with being an habitual third offender.

On December 10, 1984, pursuant to a plea bargain, defendant pled guilty to third degree criminal sexual conduct and to being an habitual second offender. The original charges were dismissed and sentencing was scheduled for January 10, 1985, but was adjourned for one week to allow defendant to take a polygraph examination on whether he used a knife to force the victim to submit to the offense. The examination indicated defendant was not being truthful concerning the knife issue and on January 17, 1985, the court entered sentence on the charge of habitual offender, second offense, of 15 to 22 and ½ years in prison.

On February 22, 1985, defendant moved to withdraw his plea of guilty. Following an evidentiary hearing September 24-25, 1985, the motion was denied. Defendant appeals of right contend-

ing that the trial court abused its discretion by failing to grant the motion to set aside the guilty plea.

It is first alleged that defendant was denied effective assistance of counsel for the failure of his appointed counsel to check the actual number of prior existing felony convictions against defendant. According to defendant, there was only one rather than two prior convictions, and had defendant been informed of this fact by appointed counsel, he might not have pled guilty. We disagree on two grounds.

First, the plea to third degree criminal sexual conduct/habitual second offender reduced the potential penalty from life imprisonment to 22 and ½ years in prison. Whether defendant had one or two prior convictions made no difference on the potential sentence of life imprisonment for first degree criminal sexual conduct. Given the facts adduced at preliminary examination, we cannot say that defense counsel did not perform as well as a lawyer with ordinary training and skill in criminal law, or that there was a reasonable likelihood that the defendant would not have been convicted of first degree criminal sexual conduct had the plea agreement not been made and the case had gone to trial. *People* v *Garcia*, 398 Mich 250; 247 NW2d 547 (1976); *Beasley* v *United States*, 491 F2d 687 (CA 6th, 1974).

Second, at the evidentiary hearing, defendant's appointed counsel was called to the stand and testified that he fully advised defendant of a variety of possible pleas, convictions and possible consequences. He stated that his strategy in plea negotiations was to avoid a maximum potential penalty of life imprisonment for his client. He also stated that it was defendant's desire to use the prior conviction for receiving and concealing to underlie the habitual second offender plea so that he could try to avoid being viewed as a repetitive sex offender. Generally, decisions relating to trial strategy will not support a claim of ineffective assistance of counsel. *People* v *Grant*, 102 Mich App 368; 301 NW2d 536 (1980). An appellate court does not substitute its judgment for

that of trial counsel on matters of strategy. *People* v *Burns*, 118 Mich App 242; 324 NW2d 589 (1982).

It is also alleged that defendant was denied effective assistance of counsel when appointed counsel allowed defendant to take the polygraph examination regarding the knife. However, it was at defendant's insistence that he did not use a knife that the original date for sentencing was postponed. Even after being fully advised of his rights, the purpose of the polygraph test and the possible consequences thereof, defendant elected to take the test. Had the trial court not permitted the test, in all probability, defendant would have claimed ineffective assistance of his counsel for not insisting that the polygraph be taken.

A second claim of reversible error is raised by defendant, viz: that the trial court failed to specifically advise defendant of his right to a separate jury trial on the charge of habitual offender, as required by MCL 769.13; MSA 18.1085. A single recital of rights applying to both the charged offense and the habitual offender charge may be sufficient. *People* v *Voss*, 133 Mich App 73; 348 NW2d 37 (1984). Separate advice of rights as to an habitual offender plea is not required provided the defendant understands that the two pleas are separate. *People* v *Cuellar*, 144 Mich App 187; 374 NW2d 925 (1985).

Our examination of the transcript clearly discloses that while the court gave a single recital of rights, the court clearly indicated there were two separate offenses to which the defendant entered separate pleas after having been read the recitation of rights.

Further, in denying the motion to withdraw the plea of guilty the trial court stated the court believed the defendant was made aware of his right to separate trials on the underlying offense and on the habitual offender charge. Defendant's appointed attorney testified that he had advised defendant of his right to separate trial on the habitual offender charge following which defendant him-

self signed the printed court form including the waiver section pertaining to trial by jury.

Affirmed.

/s/ Robert J. Danhof
/s/ Glenn S. Allen, Jr.
/s/ Donald E. Holbrook, Jr.

APPENDIX C

TRANSCRIPT

THE COURT: With respect to the Habitual Offender aspect of this case, and that is the plea taking, the Court does recognize that perhaps the record could have been more complete. But, you know, in my own research I have come up with another case here that is of very recent, May of '85. I am citing now from the criminal defense newsletter, which I subscribe to, of the State Appellate Defender's Office. This case is *People* v *Albert C-u-e-l-l-a-r Jr.*, Number 75906, a Court of Appeals case, with Judges Cynar, Kelly and Evans. I will read from this case:

> "Afirm (sic) defendant's plea-based conviction of Larceny in a Building and Third Felony Offender. Defendant who pled to the Larceny and Habitual Offender Counts on the single proceeding as part of a single plea bargain, sought reversal of this Habitual Offender conviction because the plea taking court failed to separately advise him of the rights he was waiving by pleading to the Supplemental Information. While a defendant who pleads as a Habitual Offender must be advised in accordance with MCR (1985) 6.101 (F) (1), GCR 1963, 785.7 (1), the record reveals that the pleas here were consistently distinguished and characterized as two separate pleas. The panel has concluded that a single recital of rights in this context was proper, noting that defendant was represented by able counsel and obtained dismissal of the pending absconding charge in another Supplemental Information in return for his plea."

Without going on and quoting any further, I would note that Judge Evans dissented. He didn't like the "intertwining" of the guilty pleas. But in any event, there is a recent Court of Appeals case that indicates, at least by two to one majority, that the intertwining of these pleas is not per se wrong or reversal. The Court then looks to the record in this case. I think starts off by waivers in which it was, I believe, written in by the Defendant himself, at least signed by him and read by him. Where it talks

about him pleading to two separate charges, the CSC charge and the Habitual Offender charge.

Then on the record there is discussion in quite detail about the two charges. And in fact, at one point the Court made a mistake about whether it was a Four or Third or Second. And we got that all straightened out on the record. And at all times the Defendant indicated that he did in fact understand.

Now, I believe that the Defendant was fully informed. And I think that the Defendant knew what he was doing. He knew his rights. He knew that he had a right to a trial on each of these charges.

And I would point out, in connection with that, related to that is the allegation of ineffective assistance of counsel. I have heard the testimony here. And it seems to me a lot of this was a matter of strategy, talking about the requirement, or at least the suggestion, that Mr. Decocq should have brought a Motion to Quash. But it seems to me that what he did was advise his client that it wasn't going to make any difference on the Second or Third. As part of the whole plea bargain he was escaping from the possibility of a life sentence, and putting a cap on the sentence of 22½ years. That is the essence of this whole plea.

And to suggest that the day before trial he has ineffective counsel, when he is able to win that plea reduction — I am not going to speculate what this Court would have done had there been a CSC One conviction. But after all, if the Court gave him a maximum sentence of 15 to 22½ years on a CSC Three with a Habitual Two, it doesn't take much to be worried about what this Court might have done had there been a CSC One conviction, regardless of whether there was a Habitual conviction where he could have been sentenced to any number of years up to life.

There is no doubt Mr. Fortin was in jeopardy. He was in jeopardy because of this allegation with a knife and the possibility of the jury believing the young lady in the case. And had he been

convicted of CSC One, he faced the possibility of a stiff sentence, and stiffer than what he ultimately received. At least, that is a strong possibility, seeing that the trying judge, the sentencing judge, myself, gave him the max on what he did receive, what he did plead guilty to.

I find a lot of what I have heard in the form of argument and the questions, are the criticism of the strategy of Defense Counsel, Mr. Decocq and Mr. Perkins. We have to keep in mind, and I don't know if the record was all of that clear on that, this was the day before trial. This Defendant had his right to go to trial that next day. As I stated on the record, I was rather surprised there was going to be a plea here because we were scheduled for trial the very next day. It had been my impression that a plea had been rejected and that we were in fact going to trial. He chose to plead guilty to CSC Three. The story he told his attorney indicated he was guilty at least of that, by his own admission, and faced the possibility of being also convicted of CSC One.

It seems to me it was effective assistance of counsel, good strategy, and just plain common sense to avoid the possiblity in a rape case of a very stiff sentence, in excess of what he actually received on the CSC Three and Habitual Second.

With regard to the suggestions that he was promised certain things, I think that this Court will view that with a jaundice eye. I am looking at the possible bias of the witnesses. Obviously, Mr. Fortin has bias. I suppose one could argue Mr. Decocq has a bias. He likes to look good in such situations when such accusations are made. But certainly, his impetus for maybe fabricating is less than the man actually serving the time in this case.

I found Mr. Fortin's testimony to be somewhat inconsistent. He would testify along one line, and a short time later with another question, or upon cross-examination, he would come up with some wholly new version of something. And I find that interesting, that in fact his attorney did testify that he was

inconsistent and nervous and would not make a good witness. He didn't make a good witness. And I tend to not really believe much of what he had to say. It was my impression that Mr. Fortin would say anything at this point to get himself out of the fix that he finds himself in. I base that not only on the fact that he is in that fix, but what I heard on the witness stand, his demeanor, more in the inconsistencies in his testimony. None of which is to say he is a stupid man. He is not. You know, he knew the importance of that knife. Mr. Fortin knew that he could quite possibly get treated more harshly if in fact the Court believed there was a knife involved. He, in his own unsophisticated way, is quite clever, and I do not find him to be stupid. I find it totally incomprehensible and unbelievable that he would sit here and testify that he didn't know anything of what was going on at that plea taking. It just couldn't be.

I pride myself on taking good pleas, on telling Defendants that I am making it clear to them that I do not want a plea for the sake of just getting something over, only plead guilty if they are in fact guilty. And I take a lot of time with my pleas, much to the chagrin of some of the attorneys who have to sit through that, and sometimes the record doesn't reflect that. But in fact, I do take a lot of time. I do make sure that they know what they are doing. And I was convinced at the plea taking, as I am now, that this Defendant knew what he was doing.

I do not find it is credible to believe he was made all kinds of promises by his attorney, as pointed out by Mr. Decocq in his testimony. Mr. Decocq would never have told him that 3 to 10 was a likely sentence. That is an impossible sentence under those particular circumstances, that is a CSC Three and a Habitual Two. The sentence would have to be 3 to 22½. The 22½, of course, is set by the legislature. So anything — I don't find it believable that he would have said 3 to 10. He might have said 3 to 22½ as a possibility, but he also testified himself, and that is Mr. Decocq I am talking about, that he could have said 2 to 22½.

But he never would have said 3 to 10. That was made up by the Defendant, I am convinced of that.

Again, I repeat, there was effective assistance of counsel in this particular case. I am not convinced there was anything but that.

As to the plea taking itself, and the big issue in this case was life versus a lesser sentence, or a lesser possibility with a cap on it. That is what he was fighting for, and that is what he was bargaining for, and that is what he got. He probably got a good bargain.

With respect to the polygraph, again I think the record is clear, and I made it clear at the sentencing, this was something requested by the Defendant. I know polygraphs are not generally admissible. This was something he wanted to do. He made that offer, and then this Court would consider it. They asked to take a polygraph. They wanted to dispute the complaining witness's testimony, or statement in the PSI about the use of a knife. And I allowed him to do that. They are entitled to a hearing, or an opportunity to refute disputed facts. I let them do that in any manner they thought fit, and that turned out to be a polygraph. It did not do so. It did not refute the idea of a knife.

Now, there was an ambiguity, and that was pointed out to me by Counsel. No one requested an adjournment for a further clearing up of that situation. Again, we get into matters of strategy sometimes too. Who knows what we might have found out had we tried to clear up the situation. But on the record I indicated that I was taking it in the light most favorable to the Defendant. That is that there was a suggestion that he wasn't telling the truth. But I took it in — not as to the use of the knife — and this is all in the transcript, but as to the possibility of a threat of a knife, doing something or saying something to lead this girl to believe that he had a knife.

In other words, what I had indicated, and do indicate now, is that I took it to mean that he hadn't refuted that possibility. I ignored the possibility of an actual use of the knife.

So even that, a polygraph, again at the Defendant's request, I took those results, because of any ambiguity, or the result of those ambiguities, in favor of the Defendant. The suggestion of a taint of dishonesty, to use Counsel's phrase, puzzles me a little bit. The taint in this case was not dishonesty. The taint in this case was the taint of being a rapist. This man goes out and rapes young girls, that I know by his plea. I am convinced of it, that it was a good plea.

And so a taint of dishonesty did not worsen any possible sentence in this case. The taint was already there in his actions in committing this particular crime.

So I do not find that there was ineffective assistance of counsel with respect to that polygraph. Again, that was a matter of strategy. They could have tried some other method. But that is what they asked for, and I allowed them to do it. As I indicated on the record, I was sorry the whole question ever came up, but that is what they asked for. I am not going to second guess them as far as what their strategy was. As far as clearing up the ambiguity, it didn't really matter because I took the ambiguities and resolved them in a manner most favorable to the Defendant, short of actually exonerating him from any idea of the use of the knife, or the threat of a knife. I couldn't totally ignore what they presented to me. And I did ignore a lot of it with respect to the prejudicial comments. And again, I stated that on the record even more clearly than I stated it earlier here I was perfectly aware and felt that probably the polygraph operator was using this opportunity to stick it to this Defendant. I stated that on the record, and totally ignored that in any consideration of the sentence.

All in all, I do not find that the burden has been carried by the Defendant in this case. I feel that this Defendant did know of

his rights with regard to the Habitual Offender, as he did know all of these other rights.

I do not find him to be an unintelligent person. In fact, I think he is rather clever in spotting what is in his own best interest. And I do not find him to be particularly credible. I find him to — I find he will say what helps him out at a given moment, and that leads to certain inconsistencies.

I do not find he had ineffective assistance of counsel either at plea taking or at the sentencing time. In fact, I think he got a good deal, all things considered, when you face the possibility that he may have been convicted, or could have been convicted of the CSC One charge.

As a matter of fact, I think it was summed up pretty well by Mr. Decocq, the Defense Counsel. If he testified, he would have been convicting himself out of his own mouth of CSC Three. And in the attorney's opinion there would have been no doubt he would have been convicted of Habitual Second. And by taking the plea bargain, he avoided the possibility of a trial and avoided what sometimes happens in these trials, that is the Court hearing so much of the details of a case that it becomes so familiar with the case. And if a crime is particularly heinous by its very nature — this kind of a crime is heinous — but when the details come out, it even appears more heinous and sometimes the Defense Counsel fears — whether justified or not — that the judge will be harsher because he knows more of the details. That is a matter of strategy. I am not going to second guess attorneys on that. He would have, according to his attorney's view, probably have been convicted of CSC Three and Habitual Two. Better to avoid the trial and the possibility of a conviction of CSC One, with any number of years up to life.

All in all, I can't second guess that strategy. Whether I would have done that or not is another question. That is beside the point.

I do not find that the Defendant has carried the burden. The motion is denied.

MS. STUART: Thank you.

MR. DETWEILER: Thank you.